No. 84-763

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AUGUSTIN J. SAN FILIPPO,

Petitioner,

v.

U.S. TRUST COMPANY OF NEW YORK, INC.,
J. GREGORY VAN SCHAACK and BRUCE DENNEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, N.C. 27514
(919) 962-4120
Counsel for Petitioner

January 15, 1985

CASILLAS PRESS, INC. . WASHINGTON, D.C. 20036 . (202) 223-1220

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-763

AUGUSTIN J. SAN FILIPPO,

Petitioner,

v.

U.S. TRUST COMPANY OF NEW YORK, INC., J. GREGORY VAN SCHAACK and BRUCE DENNEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

In reply to the Respndents' Brief in Opposition to Certiorari in No. 84-763, Petitioner states as follows:

I

Respondents concede a conflict in the circuits as to the existence of "pendent appellate jurisdiction" in civil cases.

Buried in footnote 10 on page 8 of the Brief in Opposition is a concession that there is "an apparent conflict in the circuits" over the existence of "pendent appellate jurisdiction" in civil appeals once a collateral final order has given a court of appeals jurisdiction under § 1291.

In that footnote, Respondents acknowledge the correctness of Petitioner's claim (Pet. 11) that the decision of the Second Circuit in this civil case conflicts with the Third Circuit's ruling in two civil appeals – *Akerly* v. *Red Barn System, Inc.*, 551 F.2d 539, 542-543 (3rd Cir. 1977), and *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1209 (3rd Cir. 1979). Moreover, Respondents commendably admit that the decision below also conflicts with a criminal case from the Ninth Circuit, *United States* v. *Yellow Freight System, Inc.*, 637 F.2d 1248, 1251 n.2 (9th Cir. 1981). In the latter ruling, the Ninth Circuit held that the immediate appealability of a criminal pretrial order, qualifying as a collateral final order under § 1291, "will not confer pendent appellate jurisdiction over defendants' other claims." 637 F.2d at 1251. And in footnote 2 of the Ninth Circuit's opinion, the court rejected a contention that *Abney* imposes "no blanket prohibition of pendent appellate jurisdiction but merely held that pendent review was inappropriate in that case." Subsequent cases, said the Ninth Circuit, "have not adopted so narrow a reading of *Abney*."[1]

Such an acknowledged conflict among the circuits highlights the appropriateness of granting certiorari on the "pendent appellate jurisdiction" issue.

---

[1]The subsequent cases cited by the Ninth Circuit were this Court's decision in *United States* v. *MacDonald*, 435 U.S. 850, 857 n.6 (1978), and lower court decisions in *United States* v. *Klein*, 582 F.2d 186, 196 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *United States* v. *Cerilli*, 558 F.2d 697, 699-700 (3rd Cir. 1977), *cert. denied*, 434 U.S. 966 (1977).

II

Respondents do not deny that the decision below conflicts with this Court's decision in Abney.

The Respondents do not and cannot deny the basic conflict between the Second Circuit's "pendent appellate jurisdiction" concept and the § 1291 jurisdictional limitations announced in *Abney* v. *United States,* 431 U.S. 651, 663 (1977). As later reiterated in *United States* v. *MacDonald,* 435 U.S. 850, 857 n.6 (1978), *Abney* stands for the proposition "that a federal court of appeals is without pendent jurisdiction over otherwise non-appealable claims even though they are joined with a double jeopardy claim over which the appellate court does have interlocutory appellate jurisdiction."[2] That *Abney* proposition is at war with the Second Circuit's decree that it has pendent jurisdiction over "otherwise nonappealable issues" that overlap the issues involved in an appealable collateral final order of the *Cohen* variety.

Respondents suggest, however, that the *Abney* doctrine has "particular force in criminal prosecutions" and thus should have no application to civil cases. Such a distinction between criminal and civil cases is belied by the Third Circuit decisions, concededly in conflict with the decision below (see Point I above), that have rejected the use of pendent jurisdiction on the appeal of a collateral final order in civil settings. The distinction itself is highly questionable, if for no other reason than the fact that both criminal and civil collateral orders owe their appealability to the same statute, § 1291. Indeed, the collateral final

---

[2]Applying the *Abney* doctrine, *MacDonald* held that the appealability of a collateral final order denying a double jeopardy claim confers no pendent jurisdiction to consider a denial of a speedy trial claim. 435 U.S. at 857 n.6.

order doctrine itself originated in a civil case, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and has frequently been applied in both criminal and civil appeals under § 1291. With such common ancestry, how can a collateral civil order produce pendent offspring, while a collateral criminal order cannot?

In any event, if pendent jurisdiction is to be recognized and exercised in civil appeals, as Respondents propose, that determination should be made by this Court, rather than left to the conflicting vagaries of lower court litigation. All of which augments the appropriateness of granting certiorari to resolve this growing § 1291 jurisdictional enigma.

Respondents' further reliance on *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974), is misplaced. In *Eisen*, an order imposing costs for notification to prospective class members was deemed an appealable collateral order. This Court held that the court of appeals "therefore had jurisdiction to review fully the District Court's resolution of the class action notice problems in this case," which included a construction of Civil Rule 23(c)(2). 417 U.S. at 172.

But in footnote 10 of the *Eisen* opinion, 417 U.S. at 172, the Court carefully eschewed consideration of "whether the Court of Appeals correctly reached the issues of manageability and fluid-class recovery, or indeed, whether those issues were properly before the Court of Appeals under the theory of retained jurisdiction." *Eisen,* in other words, potentially involved a quite different problem of whether a court of appeals retains some aspects of jurisdiction following a remand to a district court; and even that problem was not reached by this Court. In no way can *Eisen* be said to be a precedent by this Court for

the exercise of "pendent appellate jurisdiction" by a court of appeals in a civil appeal from a collateral final order.

Finally, Respondents' claim (Opp. Br. 7) that this Court has exercised pendent appellate jurisdiction "in other contexts" is quite beside the point. The problem here is whether courts of appeals have pendent jurisdiction in the collateral order context of § 1291, not whether this Court has pendent jurisdiction "in other contexts" under § 1254 (which it undoubtedly has).

To repeat, *Abney* flatly contradicts the Second Circuit's pendent jurisdiction concept here exercised. Certiorari should be granted.

III

It is not necessary to consider the facts or the conclusions reached by the Second Circuit as to whether the Petitioner stated a cause of action under § 1983.

Respondents, like the court below, state a variety of "facts" that diametrically oppose those set forth in summary fashion by the Petitioner herein. Most of those so-called "facts" stem from a reading of excerpts from the criminal trial record, not from the pretrial record so far compiled in this § 1983 action. Most of the facts concerning the alleged § 1983 conspiracy have yet to be developed; they are not to be found in the record of the prior criminal proceeding, in which Petitioner was totally acquitted.

It is quite unnecessary for this Court to inquire into the facts that relate to whether Petitioner has stated a § 1983 cause of action.[3] That is the issue that the Second Circuit

[3]Petitioner has conditionally preserved, as the fourth Question Presented, the issue whether the Second Circuit abused its discretion

resolved in exercise of its "pendent appellate jurisdiction." If the *Abney* doctrine applies to this civil appeal, the Second Circuit would lack jurisdiction to reach or resolve what it conceded to be an "otherwise nonappealable issue." Since this issue is one that can be preserved for resoluton after further proceedings in the trial court, the remedy that Petitioner seeks from this Court is simply a reversal of the judgment of the Second Circuit and a remand for further § 1983 proceedings. See *United States* v. *MacDonald,* 435 U.S. 850, 863 n.9 (1978).

CONCLUSION

For the reasons expressed herein, as well as those in the Petition for Certiorari, a writ of certiorari should issue to review the judgment of the Second Circuit in this case.

Respectfully submitted,

EUGENE GRESSMAN

School of Law
University of North Carolina
Chapel Hill, N.C. 27514
(919) 962-4120

Counsel for Petitioner

---

in making an independent examination of the incomplete record to determine if a § 1983 cause of action has been stated. That question need not be reached, however, if it is determined that the Second Circuit had no jurisdiction to resolve it.